

Served: February 25, 1997



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Issued by the Department of Transportation
on the 27th day of January, 1997

In the matter of

**U.S.-POLAND THIRD-COUNTRY
CODE-SHARE OPPORTUNITIES**

Docket OST-96-1592

Applications of

**NORTHWEST AIRLINES, INC.
UNITED AIR LINES, INC.**

**Dockets OST-96-2006
OST-96-2004**

for frequency allocations

Application of

DELTA AIR LINES, INC.

Docket OST-96-2005

for code-share designation and allocation of
frequencies

ORDER

SUMMARY

By this order, we (1) designate Delta Air Lines, Inc., to serve Warsaw, and allocate it seven weekly frequencies to conduct third-country code-share services in the U.S.-Poland market effective April 1, 1997; and (2) allocate Northwest Airlines, Inc., and United Air Lines, Inc., each seven additional weekly frequencies effective November 1, 1997 to conduct third-country code-share services in the U.S.-Poland market.

BACKGROUND

On March 22, 1996, representatives of the Governments of the United States and Poland signed a memorandum of Consultations in which they agreed *ad referendum* to amend the bilateral Air

Transport Agreement.¹ The amendments specifically provide for code-sharing operations between U.S. and third-country carriers on a phased-in basis, subject to frequency limitations. By Orders 96-7-37 and 96-8-34, the Department selected Northwest Airlines and United Air Lines for the two available opportunities effective November 1996 and allocated each carrier seven weekly frequencies for their services.

Effective April 1, 1997, the United States may designate a third U.S. carrier for third-country code-share services, providing seven weekly frequencies.² In addition, on November 1, 1997, the total frequencies available to the three designated carriers increase to a total of 35 frequencies per week until October 31, 1998. Of these, two airlines may operate no more than 14 frequencies each and one airline may operate no more than 7 frequencies per week.

By notice dated November 18, 1996, we invited all U.S. certificated carriers interested in using the April 1997 third-country code-share designation and frequencies, as well as the additional frequencies that become available in November 1997, to file applications.

APPLICATIONS

Applications were filed by Delta, Northwest, and United. Delta applied for the one remaining designation for U.S.-Poland third-country code-share services available to U.S. carriers effective April 1, 1997, and requested allocation of seven weekly frequencies to implement code-share service between Vienna, Austria, and Warsaw, Poland.³ Delta states that the Vienna-Warsaw services would be operated by Austrian Airlines using its daily Warsaw-Vienna Fokker Jet service and that these services would connect with Delta's existing transatlantic nonstop services at Vienna, to and from Delta's major international gateways at Atlanta and New York (JFK). Delta proposes to begin its U.S.-Poland third-country code-share service on April 1, 1997.

Northwest and United each applied for seven of the fourteen weekly U.S.-Poland third-country code-share frequencies that become available November 1, 1997. Northwest states that it intends to use these frequencies to operate up to fourteen weekly code-share services between the U.S. and Warsaw, via Amsterdam, pursuant to its commercial alliance with KLM Royal Dutch Airlines. United states that it intends to offer fourteen weekly code-share services between the U.S. and Warsaw, via Germany (Frankfurt, Munich, and /or Dusseldorf), pursuant to its commercial alliance with Lufthansa German Airlines.

¹ The delegations noted their respective aeronautical authorities' intentions to permit operations consistent with these amendments, pending their entry into force. See the U.S.-Poland Memorandum of Consultations, dated March 22, 1996.

² A frequency is defined as one round-trip aircraft operation, pursuant to a code-share arrangement with an airline of a third country.

³ Delta states that its existing certificate authority for Route 616, segment 3, when combined with the broad integration authority issued by Order 96-7-42, permits Delta to fully exercise the code-share privileges applied for here. However, Delta also states that if, in the alternative, the Department finds that the public interest so requires, Delta requests that it be issued a new or amended certificate of public convenience and necessity, in accordance with Delta's pending certificate application in Docket OST-96-1362 (consolidated into Docket OST-96-1592).

RESPONSIVE PLEADINGS

Northwest and United each filed consolidated answers, stating that (1) they take no position with respect to the application of Delta since neither is an applicant for the third third-country code-share opportunity available to U.S. carriers, and (2) since the fourteen third-country code-share frequencies available November 1, 1997, are not oversubscribed, the Department should proceed directly to a final order allocating Northwest and United seven frequencies each.

DECISION

We have decided to issue a final order (1) to select Delta to serve Warsaw under its third-country code-share arrangement with Austrian Airlines effective April 1, 1997, and to allocate it seven weekly frequencies for these services, and (2) to allocate Northwest and United each seven weekly frequencies effective November 1, 1997, for their additional third-country code-share services in the U.S.-Poland market.

The services proposed by Delta, Northwest, and United are all provided for under *the referendum* amendments of the U.S.-Poland Air Transport Agreement. The United States Government negotiated for these rights, and they constitute valuable opportunities for U.S. carriers. We believe that it is the public interest to make maximum use of these rights, and find that the proposals of the three applicants will fully use the available rights. Specifically, Delta seeks designation for the third U.S. carrier third-country code-share opportunity available April 1, 1997, and the seven weekly frequencies available for such service. We find that it is in the public interest to select Delta for the third designation and allocate to it the requested seven weekly frequencies. Delta will increase the service options available to travelers in the U.S.-Poland market by providing additional service in the New York-Poland market, one of the largest single U.S.-Poland O&D city-pair markets, and by providing service from Delta's large hub operations at Atlanta that will provide connecting service to Warsaw from many U.S. cities, particularly cities in the southern tier of the U.S. In addition, we find that it is the public interest to grant the requests of Northwest and United for allocation of seven weekly frequencies each effective November 1, 1997, to increase their current services and make full use of the rights for third-country code-share operations by U.S. carriers in the U.S.-Poland market. In Orders 96-7-37 and 96-8-34, which selected Northwest and United for U.S.-Poland code-share services, we found that their services would offer valuable public benefits by providing nonstop-to-nonstop connecting service to and from Warsaw from a number of U.S. cities. The carriers' proposals now to expand their code-share operations in the U.S.-Poland market to fourteen weekly frequencies each will increase the public benefits of their service.

DELTA'S CERTIFICATE AUTHORITY

We have decided to issue Delta a new certificate authorizing its proposed service in the U.S.-Poland market.⁴ As is our standard practice in limited-entry markets, we will issue Delta a five-year experimental certificate.

⁴ The certificate includes route integration authority, as requested by Delta. While Delta requested authority to serve Poland via a broad number of intermediate points, the certificate authorizes service via Vienna, Austria, the intermediate point Delta proposes to serve. We note, however, that Delta could use the route integration authority included in the certificate to serve the U.S.-Poland market via various intermediate points.

FREQUENCY ALLOCATION CONDITIONS

The frequencies available for U.S.-Poland third-country code-share service are extremely valuable and we do not intend that they be wasted. It has been our consistent recent practice to make initial frequency allocations in limited-entry markets for a one-year period, and to subject frequency allocations to the condition that they will expire automatically and the frequencies will revert back to the Department if they are not used for 90 days once they become available. We will impose those two conditions on the frequencies allocated here.

ACCORDINGLY,

1. We issue Delta Air Lines, Inc., a new temporary, experimental certificate of public convenience and necessity in the form attached to engage in foreign scheduled combination air service between a point or points in the United States; the intermediate point Vienna, Austria; and the terminal point Warsaw, Poland;
2. The certificate will be effective 30 days after the service date of this order, subject to the extension of that effective date in accordance with the provisions of the certificate;
3. We allocate to Delta Air Lines, Inc., seven weekly frequencies for service in the U.S.-Warsaw market under a code-share arrangement with Austrian Airlines;
4. The frequencies allocated in ordering paragraph 3, above, shall be effective immediately for services commencing on April 1, 1997, and they shall expire (a) March 31, 1998, or (b) the 90th day after the holder fails to use the frequencies for U.S.-Warsaw service unless the Department earlier suspends, modifies, or withdraws the frequency allocation;
5. We allocate fourteen weekly frequencies for U.S.-Warsaw third-country code-share services as follows: seven weekly frequencies to Northwest Airlines, Inc., for service in the U.S.-Warsaw market under a code-share arrangement with KLM Royal Dutch Airlines; and seven weekly frequencies to United Air Lines, Inc., for service in the U.S.-Warsaw market under a code-share arrangement with Lufthansa German Airlines;
6. The allocations in paragraph 5, above, shall be effective immediately for services commencing November 1, 1997, and they shall expire (a) October 31, 1998, or (b) the 90th day after the holders fail to use the frequencies for U.S.-Warsaw service; unless the Department earlier suspends, modifies, or withdraws the frequency allocation;
7. The code-share operations authorized by this order are subject to the following conditions:
 - (a) the subject foreign air transportation shall be sold in the name of the carrier holding out the service in computer reservation systems and elsewhere, and that the carrier selling such transportation accept all obligations established in its contract of carriage with the passenger (*i.e.*, the ticket); and
 - (b) Austrian Airlines, KLM Royal Dutch Airlines, and Lufthansa German Airlines shall

not permit the code of its U.S. carrier code-sharing partner to be carried on any flight that enters, departs, or transits the airspace of any area for whose airspace the Federal Aviation Administration has issued a flight prohibition;

8. We require Delta Air Lines, Inc., Northwest Airlines, Inc., United Air Lines, Inc., Austrian Airlines, KLM Royal Dutch Airlines, and Lufthansa German Airlines to comply with the rules for airline designator code-sharing set forth in 14 CFR § 399.88 of the Department's regulations, and any amendments to the Department's regulations concerning code-share arrangements that may be adopted;

9. Unless disapproved by the President of the United States under 49 U.S.C. § 41307, this order shall become effective on the 61st day after its submission for § 41307 review, or upon the date of receipt of advice from the President or his designee under Executive Order 12597 and implementing regulations that he or she does not intend to disapprove the Department's order under that section, whichever occurs earlier⁵; and

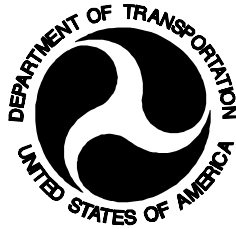
10. We will serve this order on Delta Air Lines, Inc.; Northwest Airlines, Inc.; United Air Lines, Inc.; the Ambassador of Poland in Washington, D.C.; the Department of State (Office of Aviation negotiations); and the Federal Aviation Administration (Air Carrier Branch, AFS-200).

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
and International Affairs

(SEAL)

⁵ This order was submitted for § 41307 review on January 27, 1997. On February 19, 1997, we received notification that the President's designee, under Executive Order 12597 and implementing regulations, did not intend to disapprove the Department's order.



**Experimental Certificate
of Public Convenience and Necessity
for
Foreign Air Transportation
Route 732**

This Certifies That

Delta Air Lines, Inc.

is authorized, subject to the provisions of Subtitle VII of Title 49 of the United States Code, the orders, rules, and regulations issued thereunder, and the attached Terms, Conditions, and Limitations, to engage in foreign air transportation of persons, property, and mail.

This Certificate is not transferable without the approval of the Department of Transportation.

By Direction of the Secretary

**Issued by Order 97-2-16
On January 27, 1997
Effective on March 27, 1997**

**Charles A. Hunnicutt
Assistant Secretary for Aviation
and International Affairs**



Terms, Conditions, and Limitations

DELTA AIR LINES, INC.

is authorized to engage in foreign air transportation of persons, property, and mail:

Between a point or points in the United States; the intermediate point, Vienna, Austria; and the terminal point Warsaw, Poland.

This authority is subject to the following provisions:

- (1) The holder shall at all times conduct its operations in accordance with the regulations prescribed by the Department of Transportation for the services authorized by this certificate, and with such other reasonable terms, conditions, and limitations as the Department of Transportation may prescribe in the public interest.
- (2) The holder shall at all times conduct its operations in accordance with all treaties and agreements between the United States and other countries, and the exercise of the privileges granted by this certificate is subject to compliance with such treaties and agreements and with any orders of the Department of Transportation issued under them or for the purpose of requiring compliance with them.
- (3) The exercise of the authority granted here is subject to the holder's first obtaining from the appropriate foreign governments such operating rights as may be necessary.
- (4) The holder's authority under this certificate is effective only to the extent that such operations are also authorized by the Federal Aviation Administration.
- (5) The holder shall at all times remain a "Citizen of the United States" as required by 49 U.S.C. 40102(a)(15).
- (6) The holder shall maintain in effect liability insurance coverage as required under 14 CFR Part 205. Failure to maintain such insurance coverage will render a certificate ineffective, and this or other failure to comply with the provisions of Subtitle VII of Title 49 of the United States Code or the Department's regulations shall be sufficient grounds to revoke this certificate.
- (7) Should the holder propose any substantial changes in its ownership, management, or operations (as that term is defined in 14 CFR 204.2(n)), it must first comply with the requirements of 14 CFR 204.5.
- (8) In the event that the holder commences but subsequently ceases all operations for which it was found "fit, willing, and able," its authority under this certificate shall be suspended under the terms of 14 CFR 204.7 and the holder may not recommence nor advertise such operations unless its fitness to do so has been redetermined by the

Department. Moreover, if the holder does not resume operations within one year of its cessation, its authority shall be revoked for dormancy.

(9) The holder acknowledges that this certificate is granted to determine if the holder's projected services, efficiencies, methods, rates, fares, charges, and other projected results, will, in fact, materialize and remain for a sustained period of time, and to determine whether the holder will provide the innovative or low-priced air transportation it proposed in its application for this authority.

(10) The holder may combine services on this certificate with all services authorized by other Department of Transportation certificates or exemptions; provided that, such operations are consistent with applicable international agreements; and provided, further, that (a) nothing in the award of the route integration authority requested should be construed as conferring upon the holder additional rights (including fifth freedom intermediate and/or beyond rights) to serve markets where U.S. carrier entry is limited unless the holder first notifies us of its intent to serve such a market and unless and until the Department has completed any necessary carrier selection procedures to determine which carrier(s) should be authorized to exercise such rights; and (b) should there be a request by any carrier to use the limited-entry route rights that are included in the holder's authority by virtue of the route integration authority granted here, but not being used, the holding of such authority by route integration will not be considered as providing any preference to the holder in a competitive carrier selection proceeding to determine which carrier(s) should be entitled to use the authority at issue.

This certificate shall become effective March 27, 1997; provided, however, that prior to the date on which the certificate would otherwise become effective, the Department, either on its own initiative or upon the timely filing of a petition for reconsideration of the order issuing this certificate, may by order or orders extend such effective date from time to time. It shall expire five years thereafter, unless the Department earlier suspends, modifies or deletes the authority.